Supreme Court, U. S.
FILED
NOV 17 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-726

THE AETNA FREIGHT LINES, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner, The Aetna Freight Lines, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals was entered on August 18, 1975 (Appendix (App.) B, *infra*, pp. 29a-34a), and is not yet reported. The Decision on Review and Decision and Order of the National Labor Relations Board (App. A, *infra*, pp. 10a-27a) are reported at 194 NLRB 740 and 209 NLRB 124, respectively.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, p. 35a) was entered on August 18, 1975. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

Whether the decision below, granting enforcement of a National Labor Relations Board holding that drivers of tractor-trailers in varying circumstances are employees of the carrier, not independent contractors, condones another in a welter of irreconcilable Board decisions, to the extent that the conventional judicial function of review is impaired as well as the conduct of orderly labor-management relations in the motor carrier field.

STATUTES INVOLVED

The National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 19 USC, Section 151, *et seq.* provides in pertinent part:

"Sec. 2 When used in this Act— . . .

(3) The term 'employee' shall include my employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, . . . but shall not include . . . any individual having the status of an independent contractor, or any individual employed as a supervisor . . . ." [29 USC Sec. 152(3)]

"RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." [29 USC Section 157, 158(a)(1) and (a)(5)]

STATEMENT OF THE CASE

This is one of a long line of recurrent cases, presenting a common factual background, in which tractors or tractor-trailers are leased to a common carrier (operating under authority of the Interstate Commerce Commission) by either a single owner-operator of this equipment or by a multi-unit (fleet) owner. In some such cases, as here, the National Labor Relations Board (the Board) has concluded that: (1) the status of the individual owner-operator under the National Labor Relations Act (the Act) is that of an "employee" of the carrier; and (2) the non-owning driver is likewise an "employee" of the carrier and not of the (non-driving) multi-unit owner, who in this scheme, is viewed as a "supervisor" in the carrier's enterprise, instead of an independent contractor. The courts of appeals have generally granted enforcement of the Board's orders, citing their limited powers of review, notwithstanding that in other closely comparable cases, the Board has reached precisely the opposite result—holding that the driver is an independent contractor or the employee of an independent contractor.

Petitioner (The Aetna Freight Lines, Inc. (herein Aetna)), a motor common carrier, is engaged—under certificates of convenience and necessity issued by the Interstate Commerce Commission—in the transportation of various specified commodities between points in some 19 states located in the eastern half of the country (Joint Appendix in the court of appeals (JA), 115-121, 227). In conducting its over-the-road hauling operations, Aetna employs no drivers of its own and exclusively utilizes tractors or tractor-trailers (herein also "equipment" or "trucks," the latter adopted as a generic term by the court below) from the owners of

such equipment, under a uniform lease agreement which provides that the owner is an independent contractor (JA 123, 228, 231).

Under the standard lease agreement ("Agreement for Hire of Motor Vehicle Equipment"), the owner of leased equipment covenants by the agreement (1) to grant to Aetna exclusive use of the vehicle while on the business of Aetna; (2) to keep the vehicle in good condition of repair at his own expense and to meet the requirements of all state and federal regulatory bodies; (3) to pay at his own expense "all fuel, lubrication, maintenance, licenses, taxes, fines, and other similar costs pertinent to the ownership and operation of his vehicles as an independent contractor and employer"; (4) to carry at his own expense all insurance to fully protect himself, his vehicles and to indemnify Aetna against any loss due to owner's or driver's negligence, and (5) to be "monetarily responsible for loss of or damage to cargo carried on his vehicles arising from causes determined to be due to owner's or driver's negligence . . ." (JA 123).

Aetna for its part, covenants to pay the owners, compensation for the use of their vehicles, at scheduled rates on file at Aetna's terminals and main offices, or "as may be otherwise agreed upon by both parties." (A. 123) The standard schedule was 75 percent of the revenue received from shipments where the owner supplied both tractor and trailer and 65 prcent where the owner supplied only the tractor and Aetna furnished the trailer (A. 230, 248). Additional payments may be negotiated between the parties as, for example, when loads are difficult to haul and for that reason have been rejected initially by the owners (A. 233).

Payment is made by a single check directly to the owner, without allocation by percentage or any other means between the equipment payment and the driver payment (A. 230, 288).[1]

Typically also, Aetna, like other interstate motor carriers, must abide by stringent federal regulations—promulgated by the Interstate Commerce Commission and the Department of Transportation—imposing wire-ranging duties and responsibilities including maintenance of safety standards as to both driver competency and vehicle maintenance, as well as limitations on the geographical mobility and utilization of leased equipment, after it has been loaded and departed the company terminals for over-the-road deliveries (JA 249-250, 255).

The status of only two categories of drivers was in issue in this case, which originated in 1971 as a representation proceeding before the Board to ascertain which, if any, drivers of leased trucks were employees of Aetna in an appropriate bargaining unit, eligible to vote in a secret ballot election to determine the question of union representation in collective bargaining (JA 14-16).

The first grouping consists of the so-called single owner-drivers, who both own and operate a single truck leased to Aetna; the second comprises the non-owning drivers who operate trucks leased to Aetna by the so-called multi-unit or multi-truck owners (JA 15-16). There follows a resume of the interrelationship

[1] While the standard lease is for a minimum period of no less than 30 days, some leases have been executed for minimum periods of more than thirty days depending on special circumstances (JA 123).

between Aetna, the owners of the leased trucks, and the drivers of these vehicles, as reflected by the actual day-to-day practice.

Aetna utilized over 600 tractors or trucks as of the time of the Board representation hearing; contributing to this total, through the lease of their equipment, were 104 multi-truck owners and 259 single owner-operators (JA 154, 228-229, 237).

Factors affecting in particular the multi-truck owners and their drivers: The owners in this classification may own from two to twenty tractors (JA 229), some are known to be "corporations" and one was identified as an interstate "carrier . . . within his ownright" (JA 237). Some lease equipment to carriers other than Aetna (JA 1555), so that a particular driver may haul for Aetna one week and for another carrier the week following (JA 301).

The multi-truck owners are responsible for the initial selection of their drivers (JA 230), determine their rate and mode of compensation (JA 233), may transfer them from one truck to another without notice to Aetna (JA 230), and may discharge any one of them for any reason—without consultation with Aetna (JA 277). Only through the medium of lease cancellation, could Aetna seek to compel or bring about the discharge of a non-owning driver (JA 276-279, 290). Moreover, it is the duty of the owner to insure that the drivers are familiar with governmental regulations (ICC and DOT, *supra,* p. 6), and to discipline them for violations (JA 231, 242).

Beyond this, trip advances are debited to the owner's account, not the driver's; and any withholding for Federal income tax, Social Security, or Workmen's

Compensation from the driver's remuneration is accomplished by the owner. It is the owner who pays the driver directly for work done (JA 232, 291, 299). Finally, illustrative of a pattern, when delays in transit occur the driver communicates with the owner, who in turn informs Aetna (JA 246); and in the event of driver mistakes warranting corrective or disciplinary action, Aetna would "notify" the owner (JA 234, 248, 276-277).

Factors affecting single owner-operators as well: Revenue ranges for owners, on the basis of a single tractor unit, may vary in any given year from $3,000 or $4,000 to as high as $35,000, depending on how frequently the individual owner chooses to dedicate his equipment to Aetna service. The average investment by an owner in a tractor unit ranges from $18,000 to $26,000, depending on how favorable a transaction he can negotiate. (JA 230).

Aetna imposes no regular schedule of working hours, or any minimum volume of traffic which must be transported over any particular period of time (A. 232); nor does it specify which routes the owner of the equipment must travel in delivering the traffic (A. 237). The owners have the power to accept or refuse any traffic tendered (A. 236), and can choose to operate out of any terminal throughout the Aetna system of operations (A. 233).

Aetna plays no part in financing the equipment of the owners (A. 235), guarantees no loans which the owners may take out to finance the equipment (A. 236), carries no insurance on the owners' equipment (A. 233), provides no license plates for the owners' equipment (A. 234), and does not pay any operational or maintenance expenses which the owner may incur (A.

234). Neither does Aetna require that the leased equipment be painted in any particular color or fashion (A. 235), or that the driver wear a uniform or any particular mode of dress (A. 231).

With respect to "trip-leasing"—a transaction whereby the driver contracts to haul a single interim load for another carrier—Aetna requires adherence to company restrictions governing this practice (JA 258).

Proceedings Before the Board

The Board's Regional Director, in a Decision and Direction of Election issued June 23, 1971, found that both the single owner-drivers and the non-owning drivers were employees of Aetna and constituted an appropriate bargaining unit for election and representation purposes (App. A, *infra,* pp. 1a-9a).

Acting upon Aetna's request for review, the Board on December 23, 1971, issued its Decision on Review affirming the Regional Director's decision, with certain additional findings of fact (App. A, *infra,* pp. 10a-14a). The decision was issued by a three-member panel of the Board, including then Chairman Miller who filed a separate opinion (App. A, *infra,* p. 13a-14a). The majority of the Board (Members Fanning and Jenkins, App. A, *infra,* p. 13a) reaffirming the "common law right-to-control test" rejected their "colleague's" [Chairman Miller] concern that such application . . . too seldom results in a finding of independent contractor status" (App. A, *infra,* p. 11a, fn. 2).

Following a runoff election, Aetna chose to challenge the Board's determination of the appropriate bargaining unit by declining to bargain with the union [2] that

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[2] Fraternal Association of Specialized Haulers, Local No. 100 (FASH).

was certified, advancing as a principal ground the supervening decision of the U. S. Court of Appeals for the Sixth Circuit in *Ace Doran Hauling & Rigging Co.* v. *NLRB,* 462 F.2d (6th Cir., 1972).

Subsequently, the Board, by the same panel, granted its General Counsel's Motion for Summary Judgment. Averring that it had been aware of the *Ace Doran* decision in previous rulings against Aetna, the Board issued its final decision and order on March 24, 1974 (App. A, *infra,* pp. 15a-27a).

Thus the Board, holding that Aetna had refused to bargain collectively in violation of Sections 8(a)(1) and 8(a)(5) of the Act, found essentially, in affirming the Regional Director, that (App. A, *infra,* pp. 6a-7a):

> "There are, admittedly, a number of factors in this case which would appear to militate in favor of a finding that the equipment owners are independent contractors. Thus, for example, the owners purchase, and bear the cost of operating, the leased equipment and, under limited circumstances described above, are given discretion in the selection of trips, routes, maintenance facilities and hauling assignment from other carriers.
>
> ". . ., however, that the above factors are outweighed by others which establish extensive employer control over the drivers . . . particularly the following: The overall effect of the ICC regulations requiring comprehensive employer control over the operations of the drivers and of the leased equipment; the Employer's right to the exclusive possession, control and use of the leased equipment during the term of the leases; the fact that a substantial majority of the owner-drivers haul almost exclusively for the Employer; the fact that all drivers are required to submit employment applications; the fact that the Employer can terminate

> at any time the lease agreements if the equipment is not maintained in good working condition or if the equipment is not operated to the satisfaction of the Employer; the right of either party to terminate the leases at will, any time after 30 days; the fact that payments made to the equipment owners for hauling the Employer's freight are for the most part unilaterally set by the Employer; the fact that the leased equipment is required to exhibit the Employer's name; and the requirement that drivers submit logs and physical examination reports to the Employer."

The Court of Appeals Decision

The court below (App. B, *infra,* pp. 29a-34a) granted enforcement of the Board's order, adverting to the guidelines laid down by this Court in *NLRB* v. *United Insurance Co. of America,* 390 U.S. 254, 258, and citing its limited "scope of review" in the light of *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 478 (App. B, *infra,* pp. 31a-32a). The court of appeals found no conflict between its own decision in *Ace Doran, supra,* and the Board's decision in the case at bar; nor did the court below find the Board's decision herein in conflict with a subsequent *Ace Doran* decision of the Board (App. E, *infra,* pp. 46a-63a) dated November 8, 1974, that surfaced shortly before the oral argument below.

The court below singled out as a particularly telling factor the "close control over trip leasing exercised by Aetna." (App. B, *infra,* p. 33a).

REASONS FOR GRANTING THE WRIT

The decision below warrants the exercise of the Court's power of supervision because it condones—by enforcement of a prototype Board order pervasively

affecting labor relations in a main artery of the nation's transportation system—still another and conspicuous example in a long line of mutually irreconcilable Board decision, of the same stripe and virtually indistinguishable on their material facts.

Consideration by this Court has become urgent because, among other consequences, effective judicial review, limited as it is, has been blunted or rendered well-nigh impossible by the Board's failure to reconcile its incompatible precedents bearing upon the "employee or independent contractor" question and to resolve an apparently long-standing schism within the Agency with respect to this issue. Thus the courts of appeals, which must defer to agency judgment within prescribed bounds, have been obliged to cope with a series of decisions and orders in this field, lacking in cohesive or reasoned basis to account for the disparate results reached by different panels of the Board.

This case is of manifest general and public importance. The questions here presented have a vital and direct impact upon the state of organizational activity and collective bargaining in a mode that has become the mainstay of the country's transportation network—the motor carrier industry.[3] Of this, the Court may take judicial notice, particularly in view of the deterioration and demise of the major railroad systems, cur-

[3] Regulated by the Motor Carrier Act (now ordinarily referred to as Part II of the Interstate Commerce Act, 49 Stat. 543, 49 U.S.C. 301, et seq.), enacted by the Congress in 1935, the same year that the National Labor Relations Act, *supra*, was adopted. For Carrier Financial and Statistical Data, depicting the major role of the motor carrier industry, see e.g., 88th Annual Report to Congress, 1974, Interstate Commerce Commission, Appendix E, pp. 119, et seq.

rently requiring stop-gap governmental aid on a vast scale in an effort to rehabilitate and restore rail service under private enterprise operation.[4]

In practical terms, the pattern of discordant Board decisions turning on the question of "employee" status, simply means that chronic uncertainty ad unpredictability as to their rights and duties under the Act, will continue to confront motor carrier management, along with the drivers of the tractor-trailers dotting the interstate highways, and the owners with substantial investments in these vehicles.

The resulting disarray, the prominent manifestations of which are traced below, is in plain derogation of the basic intendment of the Act—to protect self-organization and encourage the practice of collective

[4] The plight of the far-flung Penn-Central system forms a somber chapter in recent railroad history. Moreover, earlier this month, Congress—by not acting to reject—gave tacit approval to the final reorganization plan of the U.S. Railroad Association (the Government agency charged with restructuring bankrupt Midwest and Northeast railroads) that may ultimately require an outlay of public funds amounting to 10 billion or more.

As reported in *The New York Times* (Sunday, November 9, 1975, page 1, column 5):

> "The multi-billion-dollar plan, embodying the largest corporate reorganization in American history, provides for a federally financed Consolidated Rail Corporation, known as Conrail . . . to take over from the bankrupt private lines next year most of the rail freight-hauling in a populous 17-state region . . . The plan must now be implemented with legislation. Conrail is scheduled to start rolling on or shortly after Feb. 27, 1976 . . . However, it was clear long before Friday's weekend adjournment that the urgency of the Northeast rail crisis made any veto of the only viable salvage plan unthinkable.
>
> The bankrupt railroads are now losing more than $1 million a day, or about $500 million a year . . . ."

bargaining, thus avoiding or minimizing the industrial strife which interferes with the free flow of commerce.[5]

The dilemma of the reviewing courts is highlighted by the recent decision in *Local 814, Teamsters* v. *NLRB,* 512 F.2d 564 (U.S. App. D.C., April 30, 1975) in which the majority stated:

> ". . . the Board adopted the opinion of the ALJ which concluded that the owner-operators were not employees within the meaning of section 2(3) of the National Labor Relations Act. However, shortly thereafter, the Board also adopted the decision of another ALJ in Local 814, Teamsters (Molloy Brothers Moving and Storage, Inc.) 208 NLRB No. 43 (1974), which concluded that owner-operators who contracted with another member of the Moving and Storage Industry of New York were employees within the meaning of the Act. We believe the two decisions are factually similar and ostensibly inconsistent. Because the Board has not explained its reasons for reaching different results . . . we remand the record for clarification. If the Board finds the two indistinguishable, it should so inform the court. See *N.L.R.B.* v. *Metropolitan Life Insurance Co.,* 380 U.S. 438, 442 (1965). . . ."

Judge Bazelon, in a concurring and dissenting opinion, emphasized that the "requirement of a reasoned

[5] The National Labor Relations Act, as amended, *supra,* Declaration of Policy, Section 1(b).

It is noteworthy that the landmark group of cases in which the Court validated this fundamental legislative objective almost four decades ago (*National Labor Relations Board* v. *Jones & Laughlin Steel Corporation,* 301 U.S. 1, 37-38, 41-46 (1937)) included a litigant representing one of the nation's foremost suppliers of commercial trailers to the motor carrier industry. *National Labor Relations Board* v. *Fruehauf Trailer Company,* 301 U.S. 50, 53-54 (1937).

decision is central to judicial review of administrative action" and "mandates an agency to reconcile within reason its precedents and to avoid inconsistent decisions" (512 F.2d at 570). Stressing the "urgency of this requirement . . . when an agency is charged with administering a broad statutory mandate" and "the courts must defer to agency judgment," Judge Bazelon in these circumstances "would reverse the Board and remand for a thorough reconsideration of the doctrinal quicksand in this area" (512 F.2d at 571). Cf., the closely comparable views of Judge Friendly on an analogous issue. *NLRB* v. *General Stencils, Inc.,* 438 F. 2d 894 (2nd Cir., 1971).[6]

These considerations were ignored by the court below not withstanding that the Board's second *Ace Doran* decision, in which the full five-member Board participated, that issued shortly before oral argument in the court below, is blatantly at odds with previous decisions of the Board as detailed in Aetna's supplementary brief, which the court requested.

Contrary to their position in the first *Ace Doran* case, which was upheld by the court below (*Ace Doran Hauling & Rigging Co., supra*) Board Members Fanning and Jenkins concurred, without explication, with Members Kennedy and Panello and Chairman Miller that "the non-driver multiple owners and independent contractors and those drivers employed by these individuals or companies are the employees of these independent contractors" (App. E., *infra,* p. 60a); they dissented, however, with the majority's conclusion that

[6] Cf., *Moody* v. *Albemarle Paper Co.,* 417 U.S. 622 (1974) in which the Court adverted to the importance of maintaining "uniformity of decision within the circuit" 417 U.S. at 626.

the owner-drivers are also independent contractors (*ibid*).

Moreover, the majority of the Board reversed itself sharply on a number of basic criteria of which the following is illustrative (App. E, *infra,* p. 53a):

> " * * * we must recognize that *the degree of control required under governmental regulations does not necessarily mean that an employer-employee relationship has been created.* This seems plain enough in light of the Supreme Court decision in *Gray Van Lines* v. *Harrison,* 156 F.2d 412 (C.A. 7), aff'd. 331 U.S. 704 (1947) wherein independent contractors status was found even though the entities and persons there involved were subject to governmental regulations applicable to interstate carriers." (Emphasis added)

In a revealing two year period the Board decided some 14 cases in which the central issue was whether single-unit owner operators were employees or independent contractors of the motor carrier.[7] These cases all involve motor common carriers subject to Interstate Commerce Commission and Department of Transportation regulations and a common thread runs through all of the proceedings; indeed, except for

[7] *Fleet Transport Co.*, 196 NLRB 61, (April 1972); *Conley Motor Express*, 197 NLRB 57, (June, 1972); *Florida-Texas Freight, Inc.*, 197 NLRB 158, (June, 1972); *Pony Trucking, Inc.*, 198 NLRB 59, (August, 1972); *Independent Rapid Trucking*, 200 NLRB 58, (November, 1972); *Associated General Contractors*, 201 NLRB 36, (January, 1973); *Portage Transfer Co.*, 204 NLRB 117, (July, 1973); *Land O'Lakes, Inc.*, 204 NLRB 73, (June, 1953); *George Transfer & Rigging Co.*, 208 NLRB 25, (January, 1974); *Santini Bros., Inc.*, 208 NLRB 22, (January, 1974); *Pilot Freight Carriers, Inc.*, 208 NLRB 138, (January, 1974); *Aetna Freight Lines, Inc.*, 209 NLRB 124, (March, 1974); *Kreitz Motor Express*, 210 NLRB 11, (April, 1974); *Daily Express, Inc.*, 211 NLRB 19, (May, 1974).

minor variance, the cases are virtually identical on their facts.

In eight of these proceedings the Board concluded that single-unit owner operators were independent contractors,[8] and in the remaining six proceedings the Board concluded that the single-unit owner operators were employees.[9] All involved a determination of existing factors and the "right of control" doctrine.

Of particular significance is the pattern of voting of the individual Board members. Board Member Fanning participated in nine of these proceedings and in each voted that the single-unit operators were employees of the motor carrier.[10] Board Member Jenkins participated in six of these proceedings and in each voted that the single-unit owner operators were employees of the motor carrier.[11] On the other hand, Board Member Kennedy participated in nine of these proceedings and has always voted that the single-unit owner operators are independent contractors.[12] Board

[8] Fleet Transport Co., Conley Motor Express, Independent Rapid Trucking, Portage Transfer Co., George Transfer & Rigging, Co., Santini Bros., Inc., Kreitz Motor Express, and Daily Express, Inc.

[9] Florida-Texas Freight, Inc., Pony Trucking, Inc., Associated General Contractors, Land O'Lakes, Inc., Pilot Freight Carriers, Inc., and Aetna Freight Lines, Inc.

[10] Florida-Texas Freight, Inc., Pony Trucking, Inc., Associated General Contractors, Portage Transfer Co., Land O'Lakes, Inc., George Transfer & Rigging Co., Inc., Pilot Freight Carriers, Inc., Aetna Freight Lines, Inc., and Daily Express, Inc.

[11] Pony Trucking, Inc., Associated General Contractors, George Transfer & Rigging Co., Inc., Pilot Freight Carriers, Inc., Aetna Freight Lines, Inc., and Kreitz Motor Express.

[12] Fleet Transport Co., Conley Motor Express, Pony Trucking, Inc., Independent Rapid Trucking Co., George Transfer & Rigging Co., Santini Bros. Inc., Kreitz Motor Express, and Daily Express, Inc.

Member Pinello participated in nine of these proceedings and in eight of these proceedings he has voted that the single-unit owner operators are independent contractors.[13]

It is noteworthy that only Chairman Miller's voting record was somewhat flexible. In the 11 proceedings in which he participated, he voted that the single-unit owner operators are employees on five occasions [14] and independent contractors on six occasions.[15] The element of sheer gamble remains, nonetheless.

In sum, the conduct of orderly labor-management relations in the motor transportation field under consideration, to say nothing of other segments likewise affected, is needlessly prejudiced if not jeopardized by the very agency which seeks more salutary objectives. We urge that the corrective and supervisory powers of the Court be brought to bear.

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[13] Fleet Transport Co., Conley Motor Express, Independent Rapid Trucking, Portage Transfer Co., George Transfer & Rigging Co., Santini Bros. Inc., Kreitz Motor Express, and Daily Express, Inc.

[14] Florida-Texas Freight, Inc., Associated General Contractors, Land O'Lakes, Inc., Pilot Freight Carriers, Inc., and Aetna Freight Lines, Inc.

[15] Fleet Transport Co., Conley Motor Express, Independent Rapid Trucking, Portage Transfer Co., George Transfer & Rigging Co., and Santini Bros., Inc.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

[Dated June 23, 1971]

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

Case No. 6-RC-5456

THE AETNA FREIGHT LINES, INCORPORATED[1] *Employer*

and

FRATERNAL ASSOCIATION OF SPECIAL HAULERS, LOCAL UNION No. 100,[2] *Petitioner*

Decision and Direction of Election

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Stanley R. Stein, a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.[3]

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

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[1] The name of the Employer appears as amended at the hearing.

[2] The name of the Petitioner appears as amended at the hearing.

[3] The Employer's request for transfer of this proceeding to the Board for decision is hereby denied.

2. The labor organizations [4] involved claim to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.[5]

4. The Petitioner seeks to represent all of the Employer's drivers or, more specifically, all single owner-drivers and nonowner-drivers of equipment leased by the Employer. The Employer, contrary to the Petitioner and the Intervenor, moves to dismiss the petition on the ground that

[4] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Intervenor, whose status as a labor organization was stipulated to by the parties, was permitted to intervene at the hearing on the basis of its interest. The Employer and the Intervenor contend that the Petitioner is not a labor organization within the meaning of Section 2(5) of the Act. The record discloses that the Petitioner is an organization in which employees participate and which exists in whole or in part for the purpose of bargaining with employers concerning wages, hours and working conditions. In fact, the Petitioner has signed a collective-bargaining agreement with at least one employer and is currently bargaining with other employers about wages, hours and working conditions of employment. In these circumstances, I find, contrary to the Employer's and the Intervenor's contention, that the Petitioner is a labor organization within the meaning of the Act. *Long Transportation Company*, 191 NLRB No. 22; *Movable Partition, Inc.*, 175 NLRB No. 149; *Southeastern Rubber Manufacturing Co., Inc.*, 173 NLRB 797.

[5] The Employer and Intervenor contend that the Petitioner's showing of interest is not adequate to support the instant petition. It is well established that a showing of interest is a matter for administrative determination and not subject to direct or collateral attack. *Rappahanock Sportswear Co., Inc.*, 163 NLRB 703; *"M" Systems, Inc.*, 115 NLRB 1316, footnote 2. Moreover, I am administratively satisfied that the Petitioner's showing of interest was adequate to support the petition. Accordingly, I find the Employer's and Intervenor's contention to be without merit.

the single owner-drivers and the nonowner-drivers are independent contractors and employees of independent contractors, respectively.

The Employer, an Ohio corporation with its principal offices located in Warren, Ohio, is a motor carrier engaged in the transportation of special commodities across state lines. It employs some 259 single owner-drivers and an undisclosed number of non-owner-drivers, all of whose unit placement is in dispute. The Employer also employs an undisclosed number of multiple owner-drivers and trip-lease drivers, all of whom the parties agree to exclude from the unit.

The Employer is authorized to operate as an interstate motor vehicle common carrier under a Certificate of Public Convenience and Necessity granted by the Interstate Commerce Commission, herein called the ICC. In the conduct of its operations, the Employer is subject to the ICC Act and to regulations promulgated by the Department of Transportation. The various regulations contain extensive provisions regarding such matters as qualifications of drivers, the operation of motor vehicles, parts and accessories necessary for safe operation, drivers' hours of service and equipment inspection and maintenance. Although the relationship between the Employer and the equipment owners is based on lease agreements, the ICC regulations require the Employer to retain extensive control over the operation of the leased vehicles during the term of the leases and impose on the Employer the responsibility of insuring that all owner-drivers and drivers of leased equipment comply with applicable regulations.

The leases between the Employer and the owners are effective for a period of at least 30 days and thereafter until terminated by either party.[6] The lease agreements

[6] The record indicates that under certain circumstances; *viz*, the sale of equipment to the owners by the Employer, a lease of longer duration, usually 6 months, may be used.

place the leased equipment under the exclusive possession, control and use of the Employer who assumes full responsibility for the equipment to the public, the shipper and the ICC. The leases incorporate the ICC requirement that, before the Employer takes possession of the leased equipment, the vehicle is to be in compliance with various motor carrier safety regulations. In addition, the Employer agrees in accordance with ICC regulations to properly identify the leased equipment by exhibiting the name of the Employer on each vehicle and by assigning it a serial number.

The equipment owner is obligated under the leases to provide fuel, lubrication and to maintain his equipment in good running order. In the event of the failure on the part of the owner to keep his equipment in the above-required condition or if the leased equipment is not operated to the satisfaction of the Employer, the latter is entitled immediately to cancel the lease. Pursuant to the terms of the lease agreements, ownrs are fully responsible to the Employer for all damages to the cargo which they haul.

The owners purchase their own equipment and procure their own financing but may receive cash advances from the Employer.[7] Cash advances may be given for a variety of reasons, including, *inter alia*, the purchase of equipment or license plates. The owner-driver pays for most license plate fees and shares with the Employer the cost of various taxes and other fees that are required by the different states. In addition to sharing the above costs, the Employer performs most of the bookkeeping associated with these costs. It purchases cargo insurance and also carries liability and property insurance on the leased equipment

[7] Many of the owner-drivers, while owning tractors, do not own their own trailers. The trailers which they use are owned and maintained by the Employer at a cost which is unilaterally established by the Employer.

while it is being operated in connection with the Employer's business. In addition, bobtail insurance is made available to the owner-drivers by the Employer. The ICC regulations require that mechanical inspections of the leased equipment, the results of which are to be submitted to the Employer, be conducted on a monthly basis. In addition, the Employer insists that the leased equipment be inspected by its own employees at least once every 20 days to determine if it meets applicable safety regulations. When not in use, the equipment is parked on the Employer's premises without cost to the owners.

The owner-driver is paid a single-sum according to a compensation schedule unilaterally established by the Employer although, on occasion, an hourly rate may be used for time spent waiting to be loaded.[8] All drivers receive their hauling assignments from the Employer's dispatcher. They may refuse to take specific hauls if they so desire and are given discretion in the selection of routes, except that the Employer's ICC certificate requires its drivers to use designated gateway points when entering or leaving certain areas. Substantially all of the owner-drivers who have lease agreements with the Employer haul exclusively for the latter. Not only does the ICC require the Employer's permission before an owner-driver can trip lease for another carrier but, in practice, trip leasing is discouraged by the Employer and, when undertaken without the Employer's permission, has resulted in cancellation of a lease.

All drivers, including owner-drivers and nonowner-drivers of leased equipment, are required by the Employer to fill out employment applications. The Employer has, upon occasion, refused to accept the application of an unsatisfactory nonowner-driver. All drivers must have medical certificates which are kept by the Employer. The Em-

[8] The Employer also maintains what is known as a "pink slip" system whereby the owner-drivers are given extra compensation as an incentive to hauling comparatively undesired loads.

ployer does not make any deductions for social security tax, withholding tax and unemployment compensation from the pay checks of any of the drivers. A group health, accident and hospitalization insurance plan is available to all drivers, the cost of which is paid by the drivers. All drivers are under the same supervision, have the same general experience and driving skills, maintain appropriate driving logs in a log book provided by the Employer, share the same drivers' room facilities and receive the same Christmas gifts. In addition, all drivers, including owner-drivers and nonownerdrivers, are given copies of the Employer's rules and regulations and are given instructions on loading procedures, on the proper use of tarps and on various safety measures. All the drivers are also instructed on what to do in the event of a delay, accident or an argument with a customer. All drivers are eligible to compete for safety driving awards or bonuses and attend safety banquets sponsored by the Employer. To insure that the leased equipment is being operated properly, the Employer has engaged the services of a detective service to observe the operation of the equipmnt on the road.

The Board has held that the determination of whether an individual is an independent contractor or an employee under the Act requires, *inter alia,* the application of the common law right-of-control test. Under this test, an employer-employee relationships is said to exist when the employer reserves the right to control not only the ends to be achieved but also the means to be used in reaching such ends. Moreover, the Board has made it clear that the application of the test is not a perfunctory exercise but demands a balancing of all the evidence relevant to the relationship.[9] There are, admittedly, a number of

[9] *Deaton, Inc.*, 187 NLRB No. 102; *Cement Transport, Inc.*, 162 NLRB 1261, 1265; *National Freight, Inc., Federal Freight, Inc., and Sun Transportation, Inc.*, 153 NLRB 1536, 1538-39; *Reisch Trucking and Transportation Co., Inc.*, 143 NLRB 953, 956.

factors in this case which would appear to militate in favor of a finding that the equipment owners are independent contractors. Thus, for example, the owners purchase, and bear the cost of operating, the leased equipment and, under limited circumstances described above, are given discretion in the selection of trips, routes, maintenance facilities and hauling assignment from other carriers.

I find, however, that the above factors are outweighed by others which establish extensive employer control over the drivers and require the conclusion that they are employees of the Employer. In reaching this conclusion, I rely particularly on the following: The overall effect of the ICC regulations requiring comprehensive employer control over the operations of the drivers and of the leased equipment; the Employer's right to the exclusive possession, control and use of the leased equipment during the term of the leases; the fact that a substantial majority of the owner-drivers haud almost exclusively for the Employer; the fact that all drivers are required to submit employment applications; the fact that the Employer can terminate at any time the lease agreements if the equipment is not maintained in good working condition or if the equipment is not operated to the satisfaction of the Employer; the right of either party to terminate the leases at will, any time after 30 days; the fact that payments made to the equipment owners for hauling the Employer's freight are for the most part unilaterally set by the Employer; the fact that the leased equipment is required to exhibit the Employer's name; and the requirement that drivers submit logs and physical examination reports to the Employer.

In view of the foregoing and on the basis of the entire record, I find that the single owner-drivers and the non-owner-drivers are employees of the Employer within the

meaning of the Act and I hereby deny the Employer's motion to dismiss the petition.[10]

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of Collective bargaining within the meaning of Section 9(b) of the Act:

> All drivers, including single owner-drivers and non-owner-drivers of leased equipment, excluding trip-lease drivers, multiple owner-drivers, office clerical employees and guards, professional employees and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undesigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the noticeof election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below[11], including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the desig-

[10] *Deaton, Inc., supra; Cement Transport, Inc., supra; Indiana Refrigerator Lines, Inc,.* 157 NLRB 539; *National Freight, Inc., Federal Freight, Inc., and Sun Transportation, Inc., supra.*

[11] In accordance with the parties' stipulation, a driver must have made at least 25 trips for the Employer during the 3-month period immediately preceding the issuance of this Decision in order to be deemed a regular part-time driver and thus eligible to vote.

nated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[12] Those eligible shall vote whether they desire to be represented for collective-bargaining purposes by Fraternal Association of Special Haulers, Local Union No. 100; or by International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America; or by Neither.

/s/ HENRY SHORE
Henry Shore
Regional Director, Region Six National Labor Relations Board

(SEAL)

Dated June 23, 1971,
at Pittsburgh, Pennsylvania.

[12] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236; *N.L.R.B.* v. *Wyman-Gordon Company*, 394 U.S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligble voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 1536 Federal Building, 1000 Liberty Avenue, Pittsburgh, Pennsylvania 15222, on or before June 30, 1971. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. Please furnish a total of three copies of the eligibility list mentioned above.

[Dated December 23, 1971]

194 NLRB No. 120 D-5778
Warren, Ohio

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 6-RC-5456

Decision on Review

On June 23, 1971, the Regional Director for Region 6 issued a Decision and Direction of Election in the above-entitled proceeding in which, *inter alia,* he found that the owner- and non-owner drivers of equipment leased to the Employer were its employees and not independent contractors or employees of independent contractors and that the requested unit of such drivers is appropriate.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, the Employer filed a timely Request for Review of his Decision on the grounds that, in failing to find that the Petitioner was disqualified from acting as a labor organization, he departed from officially reported precedent, and that, with respect to his finding that the requested drivers are its employees, there are compelling reasons for reconsideration of policy.

By telegraphic order dated August 17, 1971, the National Labor Relations Board granted the Request for Review and stayed the election pending decision on review. The Employer and the Intervenor, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, filed briefs on review.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the entire record in this case with respect to the issues under review, including the briefs

on review,[1] and hereby affirms the Regional Director's Decision,[2] with the following additional findings:

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[1] The Employer's request for oral argument is hereby denied as, in our opinion, the Request for Review and the briefs on review adequately present the issues and the positions of the parties.

[2] We reject the Employer's contention that the Regional Director erred in finding that the single owner-drivers and the nonowner-drivers are employees of the Employer within the meaning of the Act. In making determinations of whether drivers operating under lease agreements with common carriers are employees of independent contractors, the Board has long applied the common law right-of-control test under which an employer-employee relationship exists when the employer reserves the right to control not only the ends to be achieved, but also the means to be used in reaching such ends. *Deaton Truck Line, Inc.,* 143 NLRB 1372, affd. 337 F.2d 697 (C.A. 5). The Board has made it abundantly clear that "the application of the test is not a 'perfunctory exercise' but demands a balancing of all the evidence relevant to the relationship." *Deaton Inc.,* 187 NLRB No. 102, and cases cited therein. Obviously, such balancing requires consideration of those elements of control over "the means to be used" retained by the carriers in direct conformity with Interstate Commerce Commission regulations. We see no reason to abandon the test either in the Employer's arguments or in our colleague's concern that such application of the right-of-control test too seldom results in a finding of independent contractor status. We apply the test neither to discourage nor encourage the use of independent contractors in this industry, for we believe such subjective considerations play no proper role in our determinations. Our concern is with determining whether the parties to the relationship have in fact established the drivers as true independent contractors or have clothed them with employee status. In our view, the Regional Director has properly applied the right-of-control test to the facts of this case and we affirm his finding that single owner-drivers and nonowner-drivers are employees of the Employer. In affirming that finding, we rely on the record facts recited in his decision and upon the additional record facts set forth below. When drivers make mistakes in logs or manifests which must be corrected, the Employer issues stoploads (instructions not to give such drivers loads until he corrects his errors) through its dispatchers. The Employer has issued a directive that four stoploads can result in cancellation of the driver's lease. The Employer provides a number of services for

The Regional Director found on the basis of record evidence that the Petitioner is an organization in which employees participate and which exists in whole or in part for the purpose of bargaining and in fact has bargained with employers concerning wages, hours, and working conditions, that it is a labor organization within the meaning of the Act. As above indicated, the Employer asserts that the Petitioner is disqualified from acting as a bargaining representative of the requested unit of owner- and non-owner-drivers of equipment leased to the Employer by reason of its association with and domination by Fraternal Association of Steel Haulers, herein referred to as Steel Haulers.[3] The Employer contends that fleetowners who lease a substantial amount of equipment to the Employer and may be members of Steel Haulers are in competition with the Employer when they lease equipment to other carriers.

In *Tryon Trucking Inc.*, 192 NLRB No. 123, the Board rejected as lacking evidentiary support a contention that the Petitioner's parent organization was controlled by individuals other than drivers or owner-drivers. In the instant case, we likewise find no record evidence to support the argument that fleetowners through their membership in

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the drivers. It assists them in the purchase and financing of their equipment; it sells them all necessary items, such as gas, oil, safety devices, and parts; and it has established central pickup points for the salvage of items such as tires for resale. The Employer also issues directives from time to time setting forth procedures to be followed by drivers in situations which arise in the course of their duties, such as accidents. Supplementing the ICC requirements as to safety, the Employer requires the drivers to be at least 25 years of age and to have at least 3 years' driving experience in hauling steel.

[3] In *U.S. Steel Corp* v. *Steelhaulers*, 431 F.2d 1046, the Third Circuit Court of Appeals found that the appellants had not met the burden of proving Steel Haulers to be a labor organization, thereby immunizing it from an antitrust injunction.

Steel Haulers dominate or control the affairs of the Petitioner. We therefore find no merit in the contention that the Petitioner is disqualified from acting as a labor organization herein.

The case is remanded to the Regional Director for the purpose of conducting an election pursuant to his Direction of Election except that the eligibility payroll period therefor shall be that imediately preceding the date below.

Dated, Washington, D. C., Dec. 23, 1971.

JOHN H. FANNING, *Member*
HOWARD JENKINS, JR., *Member*
National Labor Relations Board

(SEAL)

CHAIRMAN MILLER, concurring:

I concur in the conclusions reached here by my colleagues. While in other cases such as *Deaton, Inc.*, 187 NLRB No. 102 (1971), I have expressed the need for careful scrutiny of the facts in determining whether the individuals involved are "employees" or "independent contractors," I am satisfied that in this case sufficient control over the manner in which these individuals operate has been demonstrated to support a finding of employee status. The severe restrictions on trip leasing, the use of lease terminations as discipline for failure to accept loads, the carefully prescribed time restrictions on deliveries, the detailed and uniformly applied rules regarding procedures in the event of delays and accidents, and the "how to do it" directions covering other aspects of the driving operation, all go well beyond governmental regulatory rules for the industry.

Furthermore, the payment of hourly rates for detention time, the payment of special cash and merchandise bonuses, and the unilaterally determined allocation of expenses between Aetna and the drivers suggest that there are more

"employee" attributes and less independence than would be present in a true independent contractor relationship.

In my view, my colleagues are sometimes too ready to find employee status in cases involving this industry. There has been a trend toward finding employee status in nearly every case, and to virtually eliminate, by a sort of decisional fiat, any possibility of independent contracting in the trucking field.

With that trend I disagree. But if a company such as the Employer here wishes to have whatever operating advantages accrue to it by utilizing independent contractors rather than employees, it must afford them the highest degree of independence which ICC and state regulatory authorities will permit. Paper labels will not suffice. There must be genuine independence. The facts here indicate that such independence does not exist.

For these reasons, I concur in finding employee status.

Dated, Washington, D. C., Dec. 23, 1971.

EDWARD B. MILLER, *Chairman*
National Labor Relations Board

[Dated March 26, 1974]

209 NLRB No. 124 D-8478
Warren, Ohio

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE AETNA FREIGHT LINES, INCORPORATED

and

FRATERNAL ASSOCIATION OF SPECIAL HAULERS,
LOCAL UNION 100

Case 6-CA-6836

Decision and Order

Upon a charge filed on July 18, 1973, by Fraternal Association of Special Haulers, Local Union 100, herein called the Union, and duly served on The Aetna Freight Lines, Incorporated, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 6, issued a complaint on August 8, 1973, against Respondent, alleging that Respondent had engaged in and was engaging in unfair practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on June 1, 1973, following a Board election in Case 6-RC-5456 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1]

[1] Official notice is taken of the record in the representation proceeding, Case 6-RC-5456, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938, enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*,

and that, commencing on or about June 11, 1973, and at all times thereafter, Respondent has refused and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union requested and it requesting it to do so. On August 17, 1973, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On September 13, 1973, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on September 24, 1973, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause entitled "Opposition in behalf of Employer to General Counsel's Motion for Summary Judgment, Responsive to Board's Notice To Show Cause."

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and its response to the Notice To Show Cause, Respondent attacks determinations made in the underlying representation case. Thus, it basically contends that the truckdrivers involved herein are not employees of Respondent but are instead either independent contractors or employees of independent contractors. It further contends that the Union is not a labor

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167 NLRB 151, enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follette Corp.*, 164 NLRB 378, enfd. 397 F.2d 91 ;(C.A. 7, 1968); Sec. 9(d) of the NLRA.

organization, that the unit is inappropriate for collective bargaining, and that the certification herein was invalid. In addition, Respondent states it did not refuse to bargain and contends that a further hearing is warranted on the employee status of the truckdrivers because of special circumstances and because of newly discovered and previously unavailable evidence, as to which it makes an offer of proof.

Our review of the record in Case 6-RC-5456 indicates that a hearing was held on the Union's petition and on June 23, 1971, the Regional Director issued his Decision and Direction of Election in which he found that the truckdrivers involved were employees of Respondent. Respondent then filed a timely request for review in which it disputed the Regional Director's conclusion and additionally contended that the Union was disqualified from representing the truckdrivers. By telegraphic order dated August 17, 1971, the Board granted the request for review and, on December 23, 1971, issued its own Decision on Review[2] in which it decided these issues adversely to Respondent.

Pursuant to a motion by the Intervenor,[3] on January 27, 1972, the Regional Director issued his Notice of Further Hearing to receive evidence regarding the voter eligibility of the truckdrivers and, on September 29, 1972, issued his Supplemental Decision, in which he fashioned a more equitably eligibility formula. Respondent filed a request for review, in which is contested the revision of the eligibility formula, urged that a new showing of interest be required, and also renewed its contentions concerning the independent contractor status of the truckdrivers.

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[2] 194 NLRB 740.

[3] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America had been permitted to intervene at the preelection hearing.

However, by telegraphic order dated October 31, 1972, the Board denied the request for review.

A mail ballot election was then conducted herein, with ballots due to be received on December 29, 1972. The tally of ballots indicated that of approximately 333 eligible voters, 84 cast ballots for the Union, 87 for the Intervenor, and 51 for no union. Two ballots were void and 46—a number sufficient to make them determinative—were challenged. Respondent filed timely objections in which it renewed its contentions that the truckdrivers were not its employees. On February 28, 1973, the Regional Director issued his Supplemental Decision and Direction of Runoff Election, in which he overruled Respondent's objections and resolved certain of the challenges.

A second mail ballot election was then conducted, with ballots due to be received on May 2, 1973. The tally of ballots indicated that of approximately 300 eligible voters, 106 cast ballots for the Union, 70 for the Teamsters, 25 were challenged, and 1 was void. Respondent filed timely objections in which it disputed the eligibility rules and requested reconsideration of the Board's determination that the truckdrivers were Respondent's employees. On June 1, 1973, the Regional Director issued his Third Supplemental Decision and Certification of Representative in which he overruled the objections and, inasmuch as the challenges were insufficient to affect the results of the election, certified the Union. Thereupon, Rspondent filed a timely request for review in which it urged dismissal of the petition on the ground that newly discovered evidence demonstrated that the truckdrivers were not Respondent's employees.[4] However, by telegraphic order dated July 2, 1973 the Board again denied the request for review.

In furtherance of its contention that the Board erred in its determination that the truckdrivers herein are Respond-

[4] The evidence relied on was statistical evidence of driver turnover.

ent's employees, Respondent requests further hearing, asserting that there exist both special circumstances and newly discovered, previously unavailable evidence. The purpoted special circumstances as well as the claim of newly discovered and previously unavailable evidence are premised upon the decision of the Sixth Circuit Court of Appeals in *Ace Doran Hauling & Rigging Company*,[5] in which the court concluded contrary to the Board that multiple owner-nondrivers were independent contractors and that nonowner-drivers were employees of such independent contractors and not employees of Doran. For the reasons detailed hereinafter, we find no merit in these contentions.

As note by the Respondent, the court decided *Ace Doran* in June 1972, and Respondent adverted to such decision at length both in its October 1972 and June 1973 requests for review. The Board was aware of that decision when it made its determination to deny review on those occasions. In affirming the Regional Director's finding that both owner-drivers and nonowner-drivers were employees, the Board concluded that the Regional Director had correctly applied the "right of control" test to the facts of this case. To the extent, therefore, that Respondent now wishes to introduce additional evidence that some owners of trucks are engaged in other businesses, we concluded it is irrelevant to our determination here since it is the control factors while such drivers work for Respondent which are determinative. Accordingly, Respondent's contentions and offer of proof are rejected.

[5] *Ace Doran Hauling & Rigging Company* v. *N.L.R.B.*, 462 F.2d 190, modifying 19 NLRB 428. There the court agreed with the Board's findings that owner-operators purportedly independent contractors were employees of Ace Doran, but, contrary to the Board, found that multiple owner-nondrivers were independent contractors rather than Doran's supervisors and that non-owner-drivers they paid were their employees rather than Doran's.

It is well setteled that in the absence of newly discovered or previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[6]

All issues [7] raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it demonstrate that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

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[6] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[7] In its answer to the complaint Respondent also denied that it refused to bargain with the Union. However, attached to the General Counsel's Motion for Summary Judgment are certified letters from the Union's president dated June 11 and July 6, 1973, requesting bargaining, and two responses, dated June 13 and July 11, 1973, from Respondent's lawyer. In its June 13 letter, Respondent declines to meet with the Union until the Board shall have acted on Respondent's last request for review. The July 11 letter declines to bargain "unless and until [Respondent] is directed to do otherwise by court mandate." In these circumstances, we find Respondent's denial that it refused to bargain frivolous and we deem this allegation of the complaint to be admitted and true. *May Department Stores, Co.*, 186 NLRB 86, and *Carl Simpson Buick, Inc.*, 161 NLRB 1389.

Findings of Fact

I. The Business of the Respondent

Respondent, The Aetna Freight Lines, Incorporated, is an Ohio corporation with its principal office located in Warren, Ohio, where it is engaged in the transportation of special commodities. During the 12-month period immediately preceding the issuance of the Complaint, Respondent's gross volume of business was in excess of $500,000 and, during this same period, the Respondent transported across state lines goods and materials valued in excess of $50,000 directly from points inside the State of Ohio to points outside the State of Ohio.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Fraternal Assocaiation of Special Haulers, Local Union 100, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All drivers, including single owner-drivers and non-owner-drivers of leased equipment of The Aetna Freight Lines, Incorporated; but excluding trip-lease drivers, multiple owner-drivers, office clerical employees and guards, professional employees and supervisors as defined in the Act.

2. The certification

On May 3, 1973, a majority, of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 6, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on June 1, 1973, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about June 11, 1973, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about June 13, 1973, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive repersentative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since June 13, 1973, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F.2d 600 (C.A 5), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. The Aetna Freight Lines, Incorporated, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Fraternal Association of Special Haulers, Local Union 100, is a labor organization within the meaning of Section 2(5) of the Act.

3. All drivers, including single owner-drivers and non-owner-drivers of leased equipment of The Aetna Freight Lines Incorporated; but excluding trip-lease drivers, mul-

tiple owner-drivers, office clerical employees and guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since June 1, 1973, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about June 13, 1973, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, The Aetna Freight Lines, Incorporated, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of

employment, with Fraternal Association of Special Haulers, Local Union 100, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All drivers, including single owner-drivers and non-owner-drivers of leased equipment of The Aetna Freight Lines, Incorporated; but excluding trip-lease drivers, multiple owner-drivers, office clerical employees and guards, professional employees and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Warren, Ohio, office and terminals copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily

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[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C., March 26, 1974.

EDWARD B. MILLER, Chairman
JOHN H. FANNING, Member
HOWARD JENKINS, JR., Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

D-8478

APPENDIX

NOTICE TO EMPLOYERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Fraternal Association of Special Haulers, Local Union 100, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restraint, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of

employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All drivers, including single owner-drivers and non-owner-drivers of leased equipment of The Aetna Freight Lines, Incorporated; but excluding trip-lease drivers, muliple owner-drivers, office clerical employees and guards, professional employees and supervisors as defined in the Act.

THE AETNA FREIGHT LINES, INCORPORATED
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1536 Federal Building, 1000 Liberty Avenue, Pittsburgh, Pennsylvania 15222, Telephone 412-644-2977.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No.

THE AETNA FREIGHT LINES, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Petition for Review of an Order of the National Labor Relations Board

The Aetna Freight Lines, Inc., an Ohio corporation with its principal office located in Warren, Ohio, hereby petitions the Court for review, pursuant to Section 10(f), of the Decision and Order of the National Labor Relations Board entered on March 26, 1974, holding petitioner in violation of Sections 8(a)(1) and 8(a)(5) of the Act and ordering petitioner to bargain with a named labor organization as the exclusive representative of a designated unit found appropriate by the Board (Case No. 6-CA-6836, 209 NLRB No. 124).

Petitioner, having been aggrieved by the above-stated final Order of the Board, prays that it be set aside in its entirety.

Respectfully submitted,

/s/ WARREN WOODS
Warren Woods
EDWARD G. VILLALON
LEONARD APPEL
1032 Pennsylvania Building
425 13th Street, N.W.
Washington, D. C. 20004
Attorneys for Petitioner

Of Counsel:

WILSON, WOODS & VILLALON
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APPENDIX B

Aetna Freight Lines, Inc. v. NLRB

U. S. COURT OF APPEALS
SIXTH CIRCUIT (CINCINNATI)

No. 74-1550

THE AETNA FREIGHT LINES, INC.

v.

NATIONAL LABOR RELATIONS BOARD

August 18, 1975

* * * * * * * * * * *

Petition to review an order of NLRB (85 LRRM 1614, 209 NLRB No. 124). Enforcement granted.

Leonard Appel, Washington, D. C., and J. Mack Swigert, Cincinnati, Ohio, Warren Woods, Edward G. Villalon, Lawrence E. Lindeman (Wilson, Woods & Villalon), Washington, D. C., and Taft, Stettinius & Hollister, Cincinnati, Ohio, for employer.

Margery E. Leiber (Peter G. Nash, General Counsel, John S. Irving, Deputy General Counsel, Patrick Hardin, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, and William H. DuRoss, with her on brief), for NLRB.

Before PECK and ENGEL, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

Full Text of Opinion

ENGEL, Circuit Judge:—This matter is before the court upon cross petitions filed by The Aetna Freight Lines, Incorporated and by the National Labor Relations Board for review and enforcement of an order of the NLRB, issued March 26, 1974, and reported at 209 NLRB No. 124, 89 LRRM 1614. The Board found that Aetna was in vio-

lation of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.) by refusing to bargain collectively with Local Union 100 of the Fraternal Association of Special Haulers as the exclusive bargaining representative of Aetna's employees in a unit comprised of:

"All drivers, including single owner-drivers and non-owner-drivers of leased equipment of The Aetna Freight Lines, Incorporated; but excluding trip lease drivers, multiple owner-drivers, office clerical employees and guards, professional employees and supervisors as defined in the Act."

The sole issue on appeal is whether the above described persons who drove trucks for Aetna are "employees" as defined in Section 2(3) of the Act, or whether they are independent contractors within the meaning of the 1947 amendment which provides that "The term 'employee' . . . shall not include . . . any individual having the status of an independent contractor . . ." 29 U.S.C. § 152(3).

It is the position of Aetna that neither single owner-drivers nor non-owner-drivers leased equipment are employees within the meaning of the Act, but are rather independent contractors, and that the Board's finding that non-owner-drivers are employees of Aetna is contrary to this court's decision in Ace Doran Hauling and Rigging Company v. NLRB, 462 F.2d 190, 80 LRRM 2816 (6th Cir. 1972). Aetna further claims that the Board's finding that the single owner-drivers are employees of Aetna is contrary to the Board's own later decision in Ace Doran Hauling and Rigging Co. v. Teamsters Local 413, 214 NLRB No. 84, 87 LRRM 1525. For the reasons which follow, we affirm the holding of the Board and grant enforcement of its order.

Aetna is a common carrier transporting specified commodities between points in 19 states throughout the eastern

United States. In the conduct of its operations, Aetna is subject to the Interstate Commerce Act and the regulations promulgated by the Department of Transportation. The Interstate Commerce Act permits a carrier to lease trucks in order to supplement its own equipment. Aetna leases approximately 617 pieces of equipment. The standard lease which is entered into between Aetna and the owners of the equipment provides that the owner is deemed an independent contractor. The lease also specifies that Aetna is entitled to exclusive possession, control and use of the leased equipment. The leases are generally terminable at will by either party. The question in this proceeding is the status of two categories of drivers of leased trucks: the single owner-drivers (individuals who own and drive a single truck leased to Aetna) and the non-owner-drivers (individuals who drive trucks leased to Aetna by a multi-unit owner).

In Ace Doran, supra, this court stated that in determining whether an individual is an employee or an independent contractor, the correct legal standard is the "right to control test" adopted by the Board in Deaton Truck Lines, Inc., 187 NLRB No. 102, 76 LRRM 1129, enforced, 502 F.2d 1221, 87 LRRM 2545, 88 LRRM 2384 (5th Cir. 1974). That test basically is an application of common law concepts which were incorporated into the Act by the 1947 amendment to provide "for a more traditional agency concept of 'employee'" as commanded by Congress. Ace Doran, supra, 462 F.2d at 193, 80 LRRM at 2818. We also noted in Ace Doran the language of the Supreme Court in NLRB v. United States Insurance Co. of America, 390 U.S. 254, 258, 67 LRRM 2649 (1968), that:

". . . all the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of pertinent common-law agency principles."

Thus, in evaluating the evidence here, we again emphasize that it is the totality of the evidence before the Board with which we are concerned. Moreover, our scope of review is limtied for "even as to matters not requiring expertise a court may [not] displace the Board's choice between two fairly conflicting views even though the court would justifiably have made a different choice had the matter been before it *de novo.*" Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 27 LRRM 2373, 2378 (1951).

Because this court in Ace Doran denied enforcement of that part of the bargaining order directing the carrier to bargain collectively with the non-owner-drivers who drove equipment leased by Clarence Schneider to Ace, Aetna here argues that a contrary result in this case would be inconsistent. We do not agree. In the instant case there is strong evidence that in addition to those obligations imposed upon it by ICC regulations, Aetna exercises control over the hiring and firing of drivers engaged by the multiple owners by refusing to execute leases where drivers of the leased equipment are found unacceptable and by employing lease cancellation as a means of enforcing driver discipline and discharge. Control is also evidenced by the testimony of a non-owner-driver that instructions concerning his daily tasks as a driver were received from Aetna and not from the multi-unit owner. Moreover, grievances were not lodged with the multi-unit owner but rather were settled directly with Aetna. It is thus clear that Aetna exercises substantially more control over non-owner-drivers than did the carrier in Ace Doran.

Aetna also urges that the Board's position here is contrary to the subsequent Ace Doran decision, 214 NLRB No. 84, 87 LRRM 1525, in which the Board found single owner-drivers to be independent contractors. We do not agree. Again the difference lies in the amount of control shown by the evidence. Quite clearly the Board found in that latter decision that "The independence and freedom evidenced in the record as to trip leasing is, in our judgment,

of considerable persuasive effect in showing lack of control by the Employer and, instead, substantial independence by the owner-operators." In contrast is the close control over trip leasing exercised by Aetna. Its own language in a notice to single owner-drivers demonstrates the difference:

"In the past we have gone to great trouble to line up operators with every conceivable kind of 'sticker, card, decal, permit', or whatever is necessary FOR YOU to operate legally in our many states. Some operators choose to 'use' AETNA AS A MEANS to get themselves Qualified to operate in numerous states, and then REFUSE TO HAUL for Aetna on the pretext that the load did not suit them. This provided a reason for SUCH operators to accept SINGLE TRIP LEASE loads for other carriers, illegally.

"This practice is going to STOP no matter what drastic steps WE MUST TAKE. We are not in the business of furnishing equipment for our greedy competitors."

Finally, we note that Chairman Miller, who in his concurring opinion below, expressed dissatisfaction with the majority tendency to find employee status in nearly every case, nevertheless found in this case sufficient control over the manner in which the individual drivers operate to support a finding of employee status:

"The severe restrictions on trip leasing, the use of lease terminations as discipline for failure to accept loads, the carefully prescribed time restrictions on deliveries, the detailed and uniformly applied rules regarding procedures in the event of delays and accidents, and the 'how to do it' directions covering other aspects of the driving operation, all go well beyond governmental regulatory rules for the industry.

"Furthermore, the payment of hourly rates for detention time, the payment of special cash and merchandise

bonuses, and the unilaterally determined allocation of expenses between Aetna and the drivers suggest that there are more 'employee' attributes and less independence than would be present in a true independent contractor relationship." 194 NLRB No. 120, 79 LRRM 1042, 1045.

Since we conclude that the Board properly applied the common law standards distinguishing between employees and independent contractors and that its findings that both the non-owner-drivers and single-owner-drivers are employees of Aetna are supported by substantial evidence, the order of the Board will be enforced.

APPENDIX C

Judgment

[Filed August 18, 1975]

74-1550

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE AETNA FREIGHT LINES, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Before: PECK and ENGEL, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

On petition to review an order of the National Labor Relations Board,

This cause came on to be heard on the transcript of the record from the National Labor Relations Board and was was argued by counsel.

On consideration whereof, it is now ordered, adjudged, and decreed by this Court that the order of the National Labor Relations Board be and it is hereby enforced.

It is further ordered that Respondent recover from Petitioner the costs on appeal as itemized below.

ENTERED BY ORDER OF THE COURT.

JOHN P. LEHMANN
Clerk

APPENDIX D

U. S. COURT OF APPEALS
SIXTH CIRCUIT (CINCINNATI)

Ace Doran Co. v. NLRB

[462 F.2d 190]

ACE DORAN HAULING & RIGGING COMPANY

v.

NATIONAL LABOR RELATIONS BOARD

No. 71-1566

June 14, 1972

" • • • • • • • • • •

On petition to review, and cross-application to enforce, an order of the NLRB (77 LRRM 1588, 191 NLRB No. 63). Enforcement granted in part and denied in part.

Richard D. Zaiger (Peter G. Nash, General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Charles N. Steele, with him on brief), for respondent.

Charles E. Shanklin (George W. Hairston and George, Greek, King, McMahon & McConnaughey, with him on brief), Columbus, Ohio, for petitioner.

Thomas F. Phalen, Jr. (Knee, Synder & Parks, with him on brief), Dayton, Ohio, for intervenors Truck Drivers, Chauffeurs & Helpers Local Union No. 100 et al.

Before WEICK, EDWARDS, and CELEBREZZE, Circuit Judges.

Full Text of Opinion

WEICK, Circuit Judge:—Ace Doran Hauling & Rigging Company (Ace), the employer, has petitioned to review an order of the National Labor Relations Board, reported at 191 NLRB No. 63, 77 LRRM 1588, finding that it had violated Section 8(a)(5) and (1) of the National Labor Re-

lations Act, as amended (29 U.S.C. § 151 et seq), by refusing to bargain with the Teamsters Union which had been certified as the exclusive bargaining representative of Ace's employees in an appropriate unit following representation proceedings. Chairman Miller dissented. The Board filed a cross-application for enforcement of its order and the Union was granted leave to intervene.

The principal issue before us is the appropriateness of the bargaining unit as determined by the Regional Director and approved by the Board, Ace contending that the unit inappropriately included single truck owner-drivers and non-owner drivers employed by multiple truck owners, and operating equipment leased to Ace, and that said single-owner drivers and multiple truck owners are independent contractors and are not Ace's employees. They operate out of two different terminals.

The Board also held that the multiple truck owner non-drivers were supervisors.

Ace is an interstate carrier of freight, operating in twelve states, transporting steel, machinery, and heavy articles. Its main office is located at the Blue Rock Road terminal in Cincinnati: it has twenty-three other terminals throughout the twelve states, including the Kellogg Avenue terminal in Cincinnati, all of which terminals are operated by commission agents.

Ace itself owns four tractors and trailers; it leases from single owner-drivers approximately fifteen tractors and trailers. These tractors and trailers operate only out of the Blue Rock Road terminal and are used to haul machinery. Three tractors and six trailers are leased from Clarence Schneider, a commission agent, who operates the Kellogg Avenue terminal. Two additional tractors and trailers are leased from Schneider and Gardner Truck Company, which also operates out of the Kellogg Avenue terminal. The tractors and trailers operating out of Kellogg Avenue terminal haul only steel.

Schneider has authority to solicit orders for hauling steel to be transported out of Cincinnati. He receives revenue from Ace for his equipment and drivers amounting to a percentage of the freight charges therefor, and he receives a commission for soliciting orders and operating the Kellogg Avenue terminal. At this same terminal Clarence Schneider also conducts a steel hauling operation for Besl Transfer Company and operates a garage, a service station, and wrecker business.

The representation issue here involved concerns only truck drivers operating out of the two Cincinnati terminals.

Four drivers are carried on Ace's payroll and operate its own equipment out of the Blue Rock Road terminal. Ten of the single owner-drivers operate out of this same terminal, and five of them operate out of the Kellogg Avenue terminal.

Ace is authorized to operate under a certificate issued by the I.C.C. It must, therefore, abide by extensive ICC regulations designed for the protection of the public. Under these regulations a carrier may augment its equipment by leases, but must have "full direction and control of such vehicles," and be "fully responsible of the operations thereof . . . as if the carrier was the owner of such vehicles." One part of the lease agreement between Ace and the lessors provides:

> "The relationship between the Carrier and Owner shall be that of Independent Contractor . . ."

In order to obtain a lease, an equipment owner must have his equipment pass a safety check by Ace, and any prospective driver must pass a physical examination and a check of his driving and safety records. These three procedures are required by ICC regulations. All drivers of leased vehicles must be approved by Ace.

The lease between the owner and Ace, in conformity with ICC regulations, places the equipment under exclusive possession, control, use and responsibility of Ace. Ace may sublease the equipment. The truck owner agrees to be compensated according to a rental percentage which is unilaterally determined by Ace on the basis of a predetermined revenue schedule. The owner agrees to furnish, and to pay the wages of, a qualified driver, to withhold his income and Social Security taxes, to cover him for Workmen's Compensation, and to pay for "bob-tail" insurance. Ace, however, pays for all public liability, property damage, and cargo insurance. Further, the truck owner must pay all operational expenses of the vehicle, and must pay certain damages if caused by his own fault or carelessness; and he must maintain insurance coverage for collision, fire, theft, or other catastrophe. The owner must also pay maintenance expenses for the equipment and must conform the equipment according to all laws and regulations.

Occasionally Ace advances money for travel expenses of single owner-drivers and for repair of equipment and then deducts the amount thereof upon payment for loads. Ace requires 30-day periodic inspections, and Ace's safety director conducts road checks.

Ace's central dispatcher works at the Blue Rock Road terminal, and he both controls and coordinates movement of freight from all Ace terminals with assistance of local dispatchers at each terminal. This central dispatcher provides backhaul information for drivers operating out of the two Cincinnati terminals. Upon delivery of a load all drivers are instructed to call the central dispatcher in Cincinnati on the company WATTS line, concerning backhauls. Equipment owners or drivers may arrange backhaul loads with another carrier, but they are required to pay to Ace ten percent of the gross revenue derived therefrom, and they must take their trip lease insurance from Ace. In a few cases backhauls with certain companies are prohibited.

Drivers are required by ICC to keep a log book for each trip, and are required by Ace to file with it physical examination reports, accident reports, and some other documents. Drivers are free to select their own trip routes, except when carrying over-weight or over-size loads.

Owner-drivers can refuse trips offered to them, but if they do not appear at terminals and take hauls for a period of time, their leases are terminated. Owner-drivers have no regular schedule, are not required to call in at any specific time, and Ace has no right to call them in. Owner-drivers may take time off at their discretion. Ace may cause the discipline or discharge of single owner-drivers or non-owner-drivers only for being involved in an accident or for violation of ICC rules.

Multiple owner-nondrivers have and do exercise power to hire and fire their drivers; they also assign, transfer and direct their drivers. Single owner-drivers have the right to hire substitute drivers, and some have done so, although sporadically.

Under the National Labor Relations Act an employer may not obtain judicial review of a Board decision establishing a bargaining unit, absent an order in an unfair labor practice proceeding. AFL v. NLRB, 308 U.S. 401, 5 LRRM 670 (1940); NLRB v. Checker Cab Co., 367 F.2d 692, 62 LRRM 2243 (6th Cir. 1967); NLRB v. KVP Southerland Paper Co., 356 F.2d 671, 61 LRRM 2402 (6th Cir. 1966). Here Ace, having been found to have committed an unfair labor practice, may obtain a review in this Court of the propriety of the designated bargaining unit.

The Board, however, has wide discretion in determining the appropriate bargaining unit. Packard Motor Car Co. v. NLRB, 330 U.S. 485, 19 LRRM 2397 (1947); NLRB v. Lund, 103 F.2d 815, 4 LRRM 697 (8th Cir. 1939).

The controversy here involves a determination of whether certain drivers of trucks leased to Ace are "employees" or

"independent contractors" within the meaning of the Act. In 1947 Congress amended the Act to read:

> "The term 'employee' shall include any employee, . . . but shall not include any individual having the status of an independent contractor . . ." (29 USC § 152(3)).

This amendment was generated by an expansion of the Act's concept of "employee" beyond traditional limits by the Board and the courts. In NLRB v. Hearst Publications, Inc., 322 U.S. 111, 14 LRRM 614 (1944), the Supreme Court upheld an order of the Board which had greatly expanded the definition of "employee" under the Act, the Court relying on the "expertise" of the Board. The Court held that ordinary tests of the law of agency could be disregarded by the Board in determining whether petty occupational groups were "employees" within the meaning of the Act. The 1947 amendment was enacted because of congressional dissatisfaction with the ruling in Hearst, and to provide for a more traditional agency concept of "emplyoyee".

> "The legislative history of the 1947 amendments to Section 2(3) indicates clearly the congressional intent that the status of an individual as an independent contractor or employee is to be measured by the yardstick of common law." Maxwell Co. v. NLRB, 414 F.2d 477, 487 fn. 1, 71 LRRM 2567, 3232 (6th Cir. 1969), McAllister, Senior J., dissenting.
>
> "The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act.
>
> ". . . [A]ll the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is that the total factutal context is assessed in light of

pertinent common law agency principles." NLRB v. United Ins. Co. of America, 390 U.S. 254, 256, 258, 67 LRRM 2649 (1968).

It is clear, then, what standard must be applied under the Act to determine the status of these drivers. There must be a factual determination of agency on the whole record, under common law agency principles. Nevertheless, "a determination [by the Board] should not be set aside just because a court would, as an original matter, decide the case the other way." NLRB v. United Ins. Co., supra, at 260.

In the past, in making determinations such as the one involved here, the Board has employed the correct legal test, the "right to control" test. Deaton Truck Line, Inc., 187 NLRB No. 102, P. 22,635, 76 LRRM 1129 (1971), enforced 337 F.2d 697, 57 LRRM 2209 (5th Cir. 1964), cert. denied, 381 U.S. 903, 59 LRRM 2120; Tryon Trucking, Inc., 192 NLRB No. 123, P. 23,377, 78 LRRM 1132 (1971); Reisch Trucking & Transp. Co., 143 NLRB No. 104, 53 LRRM 1457 (1963).

The Regional Director's findings in the present case, which were upheld by the Board, were that the drivers employed at the two terminals, both single owner-drivers and nonowner-drivers, all performed similar duties, enjoyed similar working conditions, and had similar skills, and therefore all were employees of Ace. As to the single owner-drivers, we are of the opinion that both the Regional Director and the Board were correct.

A number of Board decisions, some affirmed in the Courts, have developed the principle that owner-drivers of vehicles leased to a company are "employees" of the company within the meaning of the Act, and are therefore appropriate members of a bargaining unit with respect to the company. See Deaton Truck Line, Inc., supra, 187 NLRB

No. 102, 76 LRRM 1129 (1971); Maxwell Co., supra, 164 NLRB No. 97, 65 LRRM 1210, 414 F.2d 477, 71 LRRM 2567, 3232 (6th Cir. 1969); Tryon Trucking, Inc., 192 NLRB No. 123, P. 23,377, 78 LRRM 1132 (1971).

In Deaton, the Fifth Circuit agreed with the Board's conclusion and findings, stating:

> "We are satisfied that the degree of control exercised by Deaton over these individuals [drivers, including owner and multiple-owner drivers] as shown in part by the collective-bargaining history, is sufficient to support a finding that they are employees of Deaton both in law and as a 'matter of economic reality.'" (337 F.2d at 699).

In Deaton the lessors could carry cargo only for Deaton, which had exclusive control of the vehicles. The company had to approve a driver, and maintain a pool of drivers from which pool multiple owner-drivers selected other drivers. Deaton handled dispatches and supervised loading. Deaton could discharge any driver, and it carried on periodic road patrols, inspecting the trucks.

In Maxwell Co. v. NLRB, supra, (414 F.2d 477, 71 LRRM 2567, 3232 (6th Cir. 1969)), this Court approved a Board finding that single owner-drivers and drivers who operated vehicles owned by others were employees rather than independent contractors. There the employer gave approval to the hiring of drivers, received trip reports and other records from drivers, and made inspections of the trucks. Moreover, the owners were restricted to haul exclusively for this carrier.

We do not find any substantial difference in the present case from those cases cited above involving single owner-drivers, which would justify a different result. Indeed, to hold that the single owner-drivers were not employees under the Act would be a substantial departure from these

authorities, and would serve as a disrupting influence on well-established collective bargaining relationships.

Ace asserts that the only controls it has over the lessors are those required by ICC regulations, and that "employee" status cannot be based on that alone; however, we find substantial evidence of additional controls exercised by Ace over single owner-drivers. Consequently, the rationale behind our holding is based on both "additional controls" and the control and supervision exercised pursuant to ICC requirements.

It is our opinion, however, that those drivers who drive equipment leased by Clarence Schneider to Ace are not Ace's employees within the meaning of the Act. Under the "right of control" test the total factual context delineates significant differences between those drivers and the single owner-lessors who drive "exclusively" for Ace. Thus, those drivers are more appropriately classified as employees of Schneider, who is certainly an "independent contractor". Any other result would greatly expand the meaning of the term "employee" under the Act, an expansion which Congress explicitly inhibited in 1947.

In addition to the operations which Schneider conducts for Ace at the Kellogg Avenue terminal, he conducts from the same location a steel hauling operation for the Besi Transfer Company; he runs a garage and a wrecker operation and rents trucks for "Easy Haul", all at the same location. Schneider has employees other than those who drive for Ace. Schneider utilizes his employee-drivers, including those who drive for Ace, to operate his wrecker service. Although Schneider testified that interchanges of employees "very seldom" take place, he did state that there had been some interchange between his Ace drivers and his other operations. Schneider alone has power to hire and fire his employees, and to determine their rates of pay, fringe benefits and working conditions. Schneider

withholds from his employees' pay income tax, Social Security, and other benefits. Moreover, Schneider gives advances to all of his drivers and pays for their hotel bills while they are on the road.

These circumstances indicate to us that the drivers who operate Clarence Schneider's trucks are his employees rather than employees of Ace, and may be placed in the same bargaining unit as employees on the payroll of Ace. It is significant that Schneider's drivers do not drive exclusively for the benefit of Ace, but from time to time they perform other work for Schneider. Single owner-drivers, on the other hand, operate exclusively for Ace on hauls leaving Cincinnati. Nevertheless, the additional indicia of Schneider's "right of control" over the drivers are also significant in reaching this determination.

There is testimony that the Schneider-Gardner operation is similar to that of Clarence Schneider; therefore, drivers of its equipment were also inappropriately designated as members of the bargaining unit.

The order of the Board is enforced only as to the truck drivers on Ace's payroll and single owner-drivers operating out of the Blue Rock Road terminal.

Since employees of Clarence Schneider and of Schneider and Gardner Truck Company were included inappropriately in the bargaining unit, enforcement of the Board order as to them is denied. Because of this disposition, we need not consider the other questions raised by Ace.

Enforcement granted in part and denied in part.

APPENDIX E

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Decision of NLRB

ACE DORAN HAULING & RIGGING COMPANY, Cincinnati, Ohio and TEAMSTERS UNION LOCAL No. 413, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA AND THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, Case No. 9-RC-10277, November 8, 1974, 214 NLRB No. 84.

Before Miller, Chairman; Fanning, Jenkins, Kennedy, and Penello, Members.

The Petitioners seek a unit of all single owner-operators and nonowner-drivers of leased equipment driving any equipment throughout the entire system of the Employer. The Employer, on the other hand, contends that the unit sought is inappropriate on the basis that the single owner-operators who lease their tractors and trailers to the Employer are independent contractors, and that the nonowner-drivers are the employees of the owners who are also independent contractors.

The Employer, an Ohio corporation with its principal place of business in Cincinnati, Ohio, is engaged in the interstate transportation of steel, aluminum, machinery, and other heavy items throughout 12 Midwestern and Eastern States as a common carrier under license from the Interstate Commerce Commission (ICC). The Employer operates through variously located terminals, which are in most instances owned and maintained by commission agents who are paid on a percentage or commission basis out of the general tariff realized from each and every hauling job. The Employer has no drivers in its direct employ and operates basically through truck leases with

approximately 305 single owner-operators, 118 fleet owner-operators, and 50 fleet owner-drivers.

The Employer is authorized to operate as an interstate motor vehicle common carrier under a Certificate of Public Convenience and Necessity granted by the Interstate Commerce Commission. In its operations, the Employer is subject to the Interstate Commerce Act and to the regulations promulgated by the ICC and is further subject to pertinent regulations of the Department of Transportation (DOT). Under the Interstate Commerce Act, a carrier is permitted to augment its equipment by means of leases, but the carrier is not hereby relieved from certain duties and responsibilities imposed by that Act.

The relationship between the Employer and the single and multiple owner-operators is based on the terms of a lease entitled "Equipment Lease Agreement Between Owner and Carrier." The term of the lease is for a minimum of 30 days, and may be terminated by either party at any time after the initial 30-day period, or automatically, according to the lease, by either party's breach of its major provisions. The lease provides, inter alia, that the owner guarantees title to the equipment and warrants that such equipment "is in good, safe and efficient operating condition"; the owner is to submit the equipment to the carrier for the latter's inspection at the time the carrier (Employer) takes possession of the equipment, and periodically thereafter, as required by the ICC and DOT regulations; the Employer is to pay the owner a set percentage of the total tariff received ranging from 70 to 76 percent depending on the commodity and destination with higher percentages dependent on individual negotiations for special loads; any person hired by the owner and not an employee of the carrier, and any such driver hired by the owner is to be under the direction and control of the owner; the owner shall pay all salaries, wages, etc., and provide workmen's compensation and make all necessary payroll

deductions required by applicable law or regulation; and the owner shall pay for all licenses, registration fees, toll charges, decals, use permits, axle, weight, gasoline, or other types of taxes, etc. The lease also provides that the owner agrees to provide a qualified driver and any necessary helpers that may be required, to maintain the equipment at owner's expense, and to carry public liability and property insurance on the equipment when it is not being operated in the service of the carrier, and bear all other expenses necessary for the operation of the equipment. The lease further provides that the carrier may sublease the equipment (presumably to another carrier) and that the carrier shall maintain and pay for the costs of public liability, property damage, and cargo insurance on the equipment while the same is being operated in its service.

New drivers, whether they be owner-operators or nonowner-drivers working for the owners, are required to fill out company applications and undergo a physical examination. The Employer then checks the applicant's driving record and his character and credit standings. If the applicant is an owner, his equipment must be inspected. As to the inspection of equipment, the Employer has no fixed requirement as to where the equipment is to be inspected, permitting the owner to have the inspection performed at any authorized inspection station of his choice. As noted above, an owner receives a fixed percentage of the gross tariff for any hauling work that he does. As to the pay of the nonowner-drivers, the record shows that these drivers are paid on the basis of their agreements with the owners. In addition, the owners withhold all Federal and state income taxes and social security taxes and provide for their coverage under workmen's compensation insurance. The drivers receive no holiday or vacation pay from the Employer and, although the Employer does permit the drivers to participate in a voluntary group insurance program, the record indicates that very

few participate in this program. The Employer does not assist the owners in the purchase of their equipment or in the maintenance and repairs of the equipment. However, the owners can secure an advance for any one haul, but generally these advances are made by the commission agents who operate the terminals out of which the owners generally operate. The Employer is required by regulations to adhere to certain safety requirements. However, the Employer does not maintain any field safety inspectors, but rather operates its safety department on a post accident review basis with reprimands or penalties being determined after an investigation and review of the reported accidents.

The record shows that the Employer operates through commission agents who generally maintain direct and immediate contact with the owner-drivers and the nonowner-drivers. These commission agents usually own and operate truck terminals throughout the Employer's authorized area. The record shows that many of these terminal owners also own trucks that they lease to the Employer with drivers employed by and under the exclusive control of the owners. These terminal owners, in addition to owning and leasing trucks to the Employer, also provide parking and dispatch facilities to various owner-drivers who use the facilities and generally have their trucks under lease to the Employer. Clarence Schneider, owner of Schneider Trucking Company, testified that he owns the terminal land and buildings, employs approximately 10 employees, leases three trucks to the Employer, owns 2 more trucks that he uses in his own hauling business, and operates a wrecking service out of the same facilities. Richard Tannert, president of Tannert, Inc., testified that his company employs approximately 30 employees, operates a terminal and warehouse at his place of business, leases eight trucks and 30 trailers to the Employer, and has approximately 20 owner-drivers who operate out of his terminal and who have leased their trucks to the Employer. Tannert also testified

that he has been operating his trucking business and terminal for approximately 20 years but has only been associated with the Employer for the last two years. The record further shows that many of the commission agents who own and lease trucks to the Employer have most, if not all, of their drivers qualified to drive for more than one carrier and that the drivers are frequently interchanged.

In these circumstances, we are of the opinion that non-driving-multiple owners are independent contractors and that those individuals driving their equipment under leases to the Employer are employees of these independent contractors.[1]

The issue as to the status of individual owner-drivers is a more difficult one. In a previous case involving a smaller petitioner-for unit of this same Employer, this Board found the individual owner-drivers to be employees and the Sixth Circuit in the decision cited at footnote 1, supra, affirmed this Board's findings. There the court pointed to previous decisions of this Board, some of which have been affirmed in the courts. These cases included Deaton, Inc., 187 NLRB 780, 76 LRRM 1129 (1971) Deaton Truck Line, Inc. v. N.L.R.B., 337 F.2d 697, 57 LRRM 2209 (C.A. 5, 1964); The Maxwell Company, 164 NLRB 713, 65 LRRM 1210 (1967), affd. 414 F.2d 477, 71 LRRM 2567, 3232 (C.A. 6, 1969); and Tryon Trucking Inc., 192 NLRB 764, 78 LRRM 1132 (1971). The Sixth Circuit cited these cases as having "developed the principle that owner-drivers of vehicles leased to a company are 'employees' of the company within the meaning of the Act, and are therefore appropriate members of a bargaining unit with respect to the company." Thus, the court approved the Board's findings in the previous Ace Doran case stating (p. 194, 80 LRRM p. 2819):

> "We do not find any substantial difference in the present case from those cases cited above involving single-owner drivers, which would justify a different result. Indeed, to hold that the single owner-drivers were not employees under the Act would be a substantial departure from these authorities, and would serve as a disrupting influence on well-established collective bargaining relationships."

[1] Ace Doran Hauling & Rigging Co. v. N.L.R.B., 462 F.2d, 80 LRRM 2816 190 (C.A. 6, 1972).

The Employer here argues to us, however, that while this Board has in certain circumstances held owner-drivers to be employees, in other cases, depending on the specific facts with respect to the degree of control exercised over such persons by the alleged "employer," this Board has held such individual owner-drivers to be independent contractors and not employees, citing such cases as Reisch Trucking and Transportation Co., Inc., 143 NLRB 953, 53 LRRM 1457 (1963); Conley Motor Express, Inc., 197 NLRB 624, 80 LRRM 1399 (1972); Fleet Transport Company, Inc., 196 NLRB 436, 80 LRRM 1047 (1972); and Portage Transfer Company, Inc., 204 NLRB No. 117, 83 LRRM 1398 (1973). The Employer, recognizing that this Board continues to find owner-drivers to be employees in cases where substantial employer control is exercised (The Aetna Freight Lines, Incorporation), 194 NLRB 740, 79 LRRM 1042 (1971), argues that the facts of the instant case do not parallel those in such cases as Aetna but rather more closely parallel those in Conley, Fleet, and Portage, and thus compel a finding that the owner-drivers here are independent contractors.

The petitioning labor organization on the other hand argues that, consistent with its decisions in Pony Trucking, Inc., 198 NLRB No. 59, 81 LRRM 1249 (1972), affd. 486 F.2d 1039, 84 LRRM 2561 (C.A. 6, 1973). Florida-Texas Freight, Inc., 197 NLRB 976, 80 LRRM 1460 (1972); Aetna Freight Lines, Incorporated, supra; and Tryon Trucking Inc., supra, this Board should find the owner-operators here to be employees within the meaning of the Act and should also hold that Ace Doran is a joint employer

of all nonowner-drivers employed by the multiple owners. Petitioner asserts that the facts of this record demonstrate a degree of control by Ace Doran sufficient to require this legal conclusion and particularly urges this Board, in making the said determination, to take into account both such control over drivers as is required under applicable ICC and DOT regulations as well as the degree of control reserved in Ace Doran pursuant to the leases with the owner-operators and other indicia of control which it asserts are here exercised, although arguably not required by either governmental regulation or the terms of the lease.

Both Ace Doran and the Petitioner argue their positions eloquently and ably. In addition to their respectively able, although differing, analyses of the record facts each also presents, with clarity and forcefulness, what each perceives to be the equities of the situation. Ace Doran characterizes the owner-operators as true independent businessmen who should be entitled to carry on their businesses as individuals and not be subject to the majority rule principles which govern "employees" under the scheme of this Act. Petitioner on the other hand argues that the drivers are entitled to be given a chance in a Board election to decide whether they want to "enhance the market for their labor by limiting its supply through the device of offering themselves as a class and under conditions that their union will accept."

We do not purport to decide, nor do we think it is our proper role to decide, the equities of the respective positions. We are persuaded, however, of the necessity for carefully examining all of the facts in this record so that, to the best of our ability, we may properly apply the test imposed upon us by the Congress; i.e., determining whether these individuals are employees or independent contractors under applicable common law principles. In making our examination of the facts we must consider the degree of control exercised over the owner-operators regardless of

the reasons for the imposition of that control; that is, whether inspired by governmental regulations or for other business reasons. At the same time, however, we must recognize that the degree of control required under governmental regulations does not necessarily mean that an employer-employee relationship has been created. This seems plain enough in light of the Supreme Court decision in Gray Van Lines v. Harrison, 156 F.2d 412 (C.A. 7), affd. 331 U.S. 704 (1947), wherein independent contractors status was found even though the entities and persons there involved were subject to governmental regulations applicable to interstate carriers. In making our analysis we have in the instant case the advantage of a full and complete record covering the Employer's total operations, whereas in the representation case underlying our decision in Volume 191, we had exercised our discretion not to grant a full review of the Regional Director's decision therein, which in any event related only to a portion of its total operations. In the instant case, the Regional Director transferred the case to the Board for decision, as a result of which we have the complete record before us.

As evidenced by the cases cited supra it is apparent that this Board does not decide these cases on the basis of inflexible categorizations universally applied. We have not held, for example, that all owner-operators must necessarily be found to be employees or on the other hand that all owner-operators must necessarily be deemed independent contractors. The specific facts of each case are determinative of the issue. On the record here we are persuaded that the owner-drivers are in fact independent contractors and that the nonowner-drivers employed by them are employees of the independent contractors rather than of the Employer.

We note in this connection that the individual owner-drivers freely exercise their own business judgment as to what loads to accept or whether to accept a load at all.

The testimony of several such owner-drivers indicated that they exercise this judgment, choosing loads with a careful eye, for example, to their ability to obtain backhauls at the point of initial destination. While in other cases such as Aetna Freight Lines, Incorporated, supra, the truck line carefully restricted "trip leasing" initiated by the owner-operators. Ace Doran does not. "Trip leases" are in theory a lease between two carriers. Thus Ace Doran, since it has the equipment under lease to it, has the option of trip leasing that equipment only to such carriers as it may designate or to set the conditions under which such leases will be authorized. While Ace Doran here would prefer that trip leases not be executed with carriers that endeavor to hold Ace Doran liable for their freight movements, it is evident from the testimony that this desire is not implemented by Ace Doran in such a manner as to restrict the trip leases which its owner-operators may initiate. Instead it has obviously extended broad authority to its owner-operators with respect to trip leasing.

The evidence is to the effect that this discretion is widely utilized so that, in effect, owner-operators select backhauls either through trip leasing or through arrangements to haul exempt commodities (no trip leases required) in the exercise of their own business judgment. John Howard, for example, an owner-operator, testified that he "shops around" for the best freight to haul back and frequently trip leases with another carrier, Midwest Emory, on about 40 percent of his return trips. He testified that he calls both Ace Doran and Midwest Emory and selects the best load available. Yet another driver, Robert Crouse, utilizes his equipment on his returns to transport concrete block and farm machinery for resale in another business which he operates.

Yet another owner-operator testified that he does not desire return loads and exercises his independent discretion in the selection of loads so that his trucks will go only to a point where they can return the same day.

When trip leasing is engaged in, the employer does not derive any revenue and the owner-operators receive the full revenue therefrom except for a deduction to cover the cost of insurance. Contrary to our dissenting colleague, we express no opinion as to whether the broad authority here granted to owner-operators to enter into trip leases on behalf of the employer is inconsistent with applicable ICC or DOT regulations; we do not believe that it is a part of this Board's responsibility to police those rules and regulations. The only relevance of these facts to our decision, as we see it, is to enable us to determine whether the modus operandi evidenced by this record is one in which day-to-day supervision is or is not exercised over owner-operators in initiating trip leases; or whether, on the other hand, owner-operators can and do have and use broad authority to trip lease in such manner as to independently control their earnings through their freedom to use their time in accord with their own individual preference or business judgment. The independence and freedom evidenced in this record as to trip leasing is, in our judgment, of considerable persuasive effect in showing lack of control by the Employer and, instead, substantial independence by the owner-operators.

Similarly, the freedom of the drivers to decide whether or not to accept an initial load and their freedom to decide which loads they desire to take also evidences their freedom from control on a day-to-day basis and, again, demonstrates their substantial independence.

The record indicates that owner-drivers are free from controls in a number of other areas. Routes of travel are not prescribed for them; the frequency and number of hours they work is not prescribed; and they park their trucks wherever they please. These facts, too, are quite different from those in cases like Aetna Freight Lines where drivers were shown to have been disciplined for load rejections, where trip leasing was carefully and regularly con-

trolled by the employer, and where all equipment was required to be parked on company property.

In addition, the owner-operators here do not wear any identifying uniforms; select their own repair stations, fuel, and part supply sources; decide whether to drive themselves or hire a driver; set work rules and rates of pay for their hired drivers; and pay both the initial cost of the equipment (a very substantial investment) and the necessary maintenance repair costs, license fees, and collision and "bobtail" insurance.

There are, however, certain factors which do limit the full freedom of the owner-operators. The percentage of the total revenue which is paid to owner-operators is unilaterally set in most cases by the employer although the record indicates that in about 10 percent of the cases the rates are negotiated—primarily instances where special types of hauls are involved. The share of the revenue which is due to the owner-operator is, as the dissent points out, paid to him by the employer. These factors, however, we do not regard as controlling.

It is a commonly known fact in the business world that in certain business relationships one party to the transaction may be in a position essentially to fix unilaterally the terms on which he will do business with another, but that fact does not make the other his "employee." Nor is an employer-employee relationship created merely because a lessee is willing to agree to lease terms which require payments to the lessor even if the lessee is not able profitably to use the leased property, as is true here where the shipper does not promptly pay Ace Doran's bills. The issue of who assumes the financial risk of slow payment or nonpayment by the ultimate consumer of the trucking service seems to us quite tangential to the central issue of "control" of lessor by lessee, which is the determining common-law factor in our consideration.

More relevant, though, the control issue are the restrictions placed here on the owner-operators with respect to safety items. It is true that the Employer actively encourages all drivers, whether owner-operators or employees of multiple owners, to comply with governmental safety regulations. This encouragement, however, appears to be accomplished with a minimum of detailed control. Owner-operators and other drivers, for example, are subject only to a bare minimum of required training or safety instructions at times and places specified by the Employer. While medical examinations are required by the governmental regulations, the Employer does not specify that they be taken at a time and place designated by the Employer nor does the Employer specify the physician. Instead, owner-operators and other drivers are merely informed of the DOT requirements regarding medical examinations, and they undergo such examinations by a doctor of their own choosing and at a time chosen by themselves. Owners who hire drivers conduct their own training of drivers, since the Employer here conducts no such program, and holds only a brief "orientation" session with new drivers, designed primarily to acquaint them with applicable governmental regulations. Unlike some other carriers, the Employer here maintains no road patrols, nor does it in any other significant way impinge upon the time or operations techniques of the various multiple and single owner-operators.

The Employer, however, does require each driver to file a detailed application with it; the employer also has a few regulatory policies going beyond DOT regulations with respect, for example, to such matters as "on or off duty" use or possession of drugs, and with respect to its procedures to be followed in the event of accidents. The evidence also indicates that the Employer has occasionally "disqualified" drivers whose physical condition or accident record indicated to the Employer that they were unsuitable as drivers. Except for the "disqualifications,"

the above appear to us to be relatively minor infringements upon the freedom of action of the owner-operators, and are not totally uncommon in other arms-length business relationships which are not of an employer-employee variety. (New franchisees, for example, may well be required to attend some initial orientation program sponsored by a franchisor, and yet the relationship does not thereby become one of employer and employee. Nor does such a relationship result, in other contexts, from the existence of detailed understandings or agreements as to how contracting parties shall conduct themselves vis-a-vis each other in the event of emergencies, such as accidents here.)

The "disqualification" issue is more troublesome. If the Employer here were shown to have promulgated an extensive set of regulations of driver conduct, and enforced those regulations by a predetermined set of reprimands, penalties, and other discipline up to and including "disqualification" or discharge, there could be little question but that the Employer effectively controlled the conduct of the drivers, and that an employer-employee relationship was the legal effect thereof. The facts here, however, appear to show that such "disqualifications" are few in number and are limited to instances where either the safety record or the physical condition of the individuals would, in the opinion of the Employer, have made their continued assignment to driving tasks risky and unwise. There is no showing that drivers are subject to "disqualification" for any broader purpose, or that there is any pattern of discipline for inefficiency, inattention to the details of the work, insubordinate conduct, or any of the other wide variety of items which are normally regarded as misconduct giving rise to disciplinary action in a typical employer-employee setting.

While even this narrowly confined exercise of control of continued employment gives us pause, we are not persuaded that, on balance, it is sufficient to offset the proven wide degree of freedom of action of these owner-operators.

Standing virtually alone as a limitation upon that freedom, it is, we hold, not sufficient to compel a finding of employer-employee relationship. No single factor is per se decisive. Among the factors that persuade us are: (1) The owner-drivers exercise a very substantial degree of freedom in scheduling the use of their equipment, including whether they will drive themselves or hire other drivers, what routes they will take, where to have repairs made and fuel purchased, what type or make of equipment they will use, and where to park their trucks when not in use; (2) the owner-drivers are free to refuse loads without penalty; (3) the owner-drivers, if they hire other drivers, have exclusive control over the wages and working conditions of those drivers; (4) the owner-drivers pay all of the costs of maintaining their equipment; (5) the owner-drivers are not subject to any normal day-to-day supervision or control by supervisory or management officials of the Employer; (6) the owners and their hired drivers do not participate in any of the Employer's employee benefit programs; and (7) the enterprenuerial nature of the owner-driver's operations established on the record before us shows individuals making substantial capital investments in equipment, in many instances such investments being for more than a single piece of equipment, while in other cases the owners operate their equipment in conjunction with other established business operations.

In view of the foregoing, we conclude that the owner-drivers are independent contractors, and that the non-owner-drivers employed by them are employees of the independent contractors rather than of the Employer.[2] In these circumstances, and in view of the fact that there are no employees driving directly for the Employer, we shall dismiss the petition.

Petition is dismissed.

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[2] George Transfer & Rigging Co., supra, 208 NLRB No. 25, 85 LRRM 1097.

FANNING and JENKINS, Members, dissenting:

We agree with our colleagues' conclusion that the non-driver-multiple owners are independent contractors and that those drivers employed by these individuals or companies are the employees of these independent contractors. However, we do not agree with the conclusion that the owner-drivers who own and have leased to the Employer one or two vehicles are also independent contractors.

On August 10, 1970, Local 100, a sister local and affiliate of the Petitioners, was certified in a unit of the Employer's drivers limited to the Employer's Cincinnati operations (Case 9-RC-8470). Thereafter, the Employer refused to bargain with Local 100 and on June 23, 1971, the Board issued its Decision and Order (Chairman Miller dissenting) finding that the instant Employer violated Section 8(a)(5) of the Act in its refusal to bargain with Local 100.[3] Thereafter, the United States Court of Appeals for the Sixth Circuit affirmed in major part the Board's Order, denying enforcement only as to that portion of the bargaining order relating to those drivers employed by non-driver-multiple owners whom the court then, as we do here, found to be independent contractors. What is important now is that the court upheld the underlying unit finding of the Regional Director that individual owner-drivers were employees of the Employer. The majority would now reverse this finding.

In affirming the Board's earlier finding, the court of appeals relied on the degree of control required by ICC regulations and exercised by the Employer over the single owner-drivers, as well as the "additional controls" over and above the ICC requirements. In N.L.R.B. v. Pony Trucking, Inc.,[4] the court specifically reaffirmed its finding

[3] 191 NLRB 428, 77 LRRM 1588 (1971).

[4] 486 F.2d 1039, LRRM 2816 (C.A. 6. 1973).

in the earlier Ace Doran case, noting that the "additional control" factor most relied on was the fact that under the lease, the individual owner could not sublease (presumably triplease) his equipment without the consent of the lessee carrier.

The majority, in its Decision, cites various testimony that would indicate that the owner-drivers now frequently trip lease their vehicles to other carriers without the consent of the Employer and, on occasion, against the best interests of the Employer. On the record before us, we do not question this testimony. However, we seriously question the majority's reliance on this testimony as justification for finding these owner-drivers to be independent contractors. The ICC regulations *and the lease* provide that the equipment is leased into the carrier's "exclusive possession, control, use, and responsibility." It is clear that under existing law, a carrier cannot lease a truck for interstate hauling without the carrier's securing "exclusive" control of the vehicle, and, in our opinion, this exclusive control of the vehicle also carries with it the exclusive control and authority over the driver while that vehicle is engaged in transporting goods in interstate commerce.

We agree with the majority that it is not the Board's responsibility to police the ICC and DOT regulations. However, we do not believe that the National Labor policy is effectuated by our closing our eyes to the positive mandates of those regulations and Ace Doran's violations thereof. This is one of those rare occasions where "form" (the regulations and the lease) must take precedence over "substance" (the practice). We do not believe that we are being hypertechnical in insisting that interstate carriers abide by those rules and regulations properly promulgated for the benefit of the interstate trucking industry and, in our opinion, the flouting of these regulations by Ace Doran is antithetical to the public interest which the

existing Federal regulations were meant to protect.[5] Since the Employer *possesses* the authority and control over the owner-drivers, that reason alone is sufficient to discount the efficacy of the testimony that the owner-drivers are able to trip lease as they choose. In addition this independence of operations is illusory at best, and whatever independence the drivers might now have is solely at the absolute sufferance of the Employer, a very recent sufferance we might add, which we fear is compelled by but one motive: to forestall the organizational efforts of the owner-drivers heretofore found to be employees of the Employer by both this Board and the United States Court of Appeals for the Sixth Circuit.

There are other factors that also exhibit a high degree of control over the owner-drivers. Foremost among these is the Employer's safety program and the drivers' compliance therewith. It is true that the Employer has no field inspectors checking the daily activities of the drivers. However, the record clearly shows that the Employer's safety department is an efficient and effective operating department dealing with infractions of the safety rules and regulations. Reprimands are frequently issued, and, if at any time the safety department feels that a driver should give an accounting of his part in an accident, that driver *must* come to the Employer's home office in Cincinnati, Ohio, to give his account. Another factor that we believe is of critical importance is the relationship among the owners, the Employer, and the customers. The drivers deliver the loads for the customers, but it is the Employer to whom they look for their compensation. It is expected of course that the shipper will pay his bill, but even if the shipper does not promptly pay the shipping bill, the Employer pays the owner-driver the required percentage of

[5] Apart from this facet this case is essentially the same as George Transfer & Rigging Co., Inc., 208 NLRB No. 25, 85 LRRM 1097 (1974), where we likewise dissented.

the assessed tariff just as any other employee would receive his wages for services rendered. Thus, it is the Employer who assumes the risks, and, in our opinion, one of the critical factors relating to the independent contractor status of an individual is who assumes the risks.

In our opinion, the record now before us does not support the Employer's contention that single owner-drivers are independent contractors. The record shows that the Employer is the legally and operational entity responsible for the critical means and methods whereby freight entrusted to it is moved from shipper to consignee. Since the Employer is directly involved in the means as well as the results, we would find the single owner-drivers to be employees of the Employer and we dissent from the majority's contrary conclusion.